91-1955 (1)

Supreme Court, U.S.
FILED
JUN 3 1992
OFFICE OF THE CLERK

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

NORMAN A. HARRIS, PETITIONER

vs.

UNITED STATES DEPARTMENT OF AGRICULTURE,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether 5 C.F.R. 1201.115 requires the U.S. Merit Systems Protection Board to address the issue of new and material evidence discovered after the close of the Initial Hearings, that despite due diligence was not available to petitioner when the record closed, and then to make a determination to grant a petition for review?

2. Whether the U.S. Merit Systems Protection Board's failure to address the issue of new and material evidence discovered after the close of the Initial Hearing, that despite due diligence was not available to petitioner when the record closed, was a denial of due process under the Fifth Amendment of the United States Constitution?

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REFERENCE TO OPINIONS BELOW

The Judgment without opinion of the United States Court of Appeals for the Federal Circuit was entered on March 5, 1992, a copy of which is attached in the Appendix page A-49. On March 27, 1992, the Court of Appeals entered an Order denying the Petition for Rehearing. A copy of the Order issued on March 27, 1992, is attached in the Appendix page A-50.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

(i) The date of the Judgment sought to be reviewed is March 5, 1992.

(ii) The date of the order denying a rehearing is March 27, 1992.

(iii) Petitioner has no knowledge of any cross-petition for Writ of Certiorari being filed.

(iv) 28 U.S.C. 1254(1).

THE CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

This case involves the Fifth Amendment to the Constitution of the United States. Relevant language of said Amendment reads as follows: "No person shall . . . be deprived of life, liberty or property without due process of law . . . ."

This case also involves 5 C.F.R. 1201.115. Relevant language reads as follows:

> The Board, after providing the parties with an opportunity to respond, may grant a petition for review when it is established that: (1) New and material evidence is available that despite due diligence, was not available when the record closed; or (2) The decision of the Judge is based on an erroneous interpretation of statute or regulation.

STATEMENT OF THE CASE

This is a civil action which was appealed to the United States Court of Appeals for the Federal Circuit for a determination of the issue of whether the U.S. Merit Systems Protection Board erred in its finding that the petition for review did not meet the criteria set forth at 5 C.F.R. Section 1201.115. The court of appeals entered a judgment without opinion against petitioner.

Petitioner was a food inspector employed by the U.S.D.A. Food Safety and Inspection Service. He was removed from employment on August 10, 1990. The stated reason for his removal was his alleged inability to perform his assigned duties and responsibilities. Petitioner had previously successfully appealed a prior termination to the Merit Systems Protection Board, Case No. SL07528810467, slip op. (Initial Decision

January 17, 1989). After being reinstated, petitioner returned to duty; but after working two days he sought medical treatment following the manifestations of severe symptoms. He was subsequently diagnosed as having a post traumatic stress disorder (PTSD). This diagnosis was unrebutted. The PTSD was a result of factors of his employment. He currently is receiving worker's compensation as a result of the decision in Norman A. Harris v. U.S.D.A., __ECAB__ 91, [Docket No. 90-947 issued September 26, 1991].

The first termination followed an investigation including a surveillance of petitioner made by respondent's employee investigators. The investigators claimed to have made certain observations of petitioner's arrivals and departures from the Paramount Foods Plant to which petitioner was assigned to work.

Petitioner is also currently involved with Paramount Foods in litigation regarding that company's involvement in the events which led to petitioner's first termination. Norman A. Harris vs. Paramount Foods, Inc., Case No. 89 CI Ø8543, Jefferson Circuit Court, Jefferson County, Kentucky. On January 8, 1991, in that case petitioner obtained in the course of a discovery deposition of one of Paramount's management officials a copy of a log which Paramount had maintained on the times when petitioner reported to work. This log was newly discovered evidence. The initial decision in the Merit Board case was dated December 11, 199Ø. This log was maintained during the same period that the agency was conducting its surreptitious investigation of the times when petitioner reported to work. At the first Merit Board hearing petitioner maintained that the Agency investigators could not have accurately observed petitioner

through binoculars, as they claimed. Petitioner also claimed that the investigators falsified their records as to the times petitioner reported to work at Paramount. In that case, the administrative judge (AJ) visited the motel room across from Paramount Foods where the observations of petitioner were allegedly made. She determined that the investigators' testimony regarding what they claimed to have seen was not credible. The new evidence, discovered in petitioner's litigation with Paramount Foods, not only corroborates that the evidence offered by the agency's witnesses was not credible, but also that they fabricated the times that petitioner reported to work. The log of Paramount officials corroborates petitioner's time and attendance records which reflect that he did not falsify documents pertaining to the same as alleged. The agency was aware of Paramount's log. Petitioner, however, did not discover that

the log existed until after the hearing in the second Merit Board case. After filing his petition for review of the initial decision before the Board in his second Merit Board case, petitioner obtained in his case against Paramount additional discovery from a Paramount employee who indicated that in the course of his being interviewed by the agency investigators, he disclosed the existence of the log to them and, in fact, showed the log to them. The investigators, however, suppressed this evidence from being included in the documents given to the petitioner in the course of the proceedings involving his first termination. If the Board had remanded the instant case, the AJ would have become cognizant of this new evidence. Petitioner had asked the agency for exculpatory evidence prior to the first Merit Board hearing, but the Agency failed to disclose the existence of the Paramount log which corroborated part of petitioner's own time records.

Paramount's log verifies petitioner's time and attendance records, vindicates petitioner, and establishes the underlying basis for why he developed the PTSD condition. The evidence of the log was not known to petitioner prior to the closure of the record in the instant case. Information about the discovery of this new evidence, however, was submitted to the Board on petitioner's petition for review.

In his initial decision in the instant case, the AJ did not find that the Agency intentionally took actions against petitioner which caused his medical condition of PTSD; and he found on the facts before him that the PTSD was caused by petitioner's personal belief, which the AJ decided was unfounded, that he was being persecuted by the agency. This newly discovered evidence should have caused any reasonable person to alter such an opinion.

The fabrication of evidence is an intentional act. Petitioner believed that the evidence was fabricated, but until January 8, 1991, three years after the Agency's investigation, he had no documentary proof of this beyond his own time and attendance records, which his superiors chose to disbelieve. In the interest of justice, this new evidence should have been considered by the Board on appeal.

Petitioner also raised issues in his pre-hearing submissions and at the hearing that the agency was not harmed, because the duties to which he was assigned were covered without disruption to the service, that the agency's stated reason for petitioner's termination was not the actual reason, that the agency could not have taken removal action until petitioner's workers' compensation claim was finally terminated, that the agency's termination action was retaliatory and in violation of petitioner's

civil rights, and that the agency's stated reason for termination of petitioner was a pretext as its actual reason was to retaliate against petitioner because of his history of making various complaints against the agency, his history of standing up and asserting his rights and opinions, including the filing of whistle-blowing complaints, and last but not least because he had successfully fought his first termination.

The petitioner also argued to the Board that the initial decision in this matter reflects a misunderstanding by the AJ of the basis of petitioner's appeal that the AJ, disregarded or misunderstood the evidence regarding what, in fact, petitioner's medical witnesses stated in their correspondence with the agency, and that the AJ, furthermore, failed to follow the applicable law of this case.

The petitioner, a Vietnam Veteran, served as a food inspector in the military,

for the Commonwealth of Kentucky, and for the U.S.D.A. He has worked as a food inspector for over twenty years. His performance ratings are above average. He has never abused sick leave. Given ordinary circumstances, an employee with petitioner's background and record would not have been terminated for the reasons set forth by the agency and upheld by the AJ. A reading of the initial decision reflects a perception that the AJ formulated of petitioner that in turn colored his determinations of fact. This perception would have been quite different if he had had knowledge of the Paramount Log that was suppressed by the Agency. The AJ found in his initial decision:

> Finally, based on all of the record evidence before me, I do not find the Appellant's claim that his conceded inability to perform his duties and responsibilities of his position was based on intentional agency harassment, abuse, discrimination, and reprisal to have merit. (A-14)

It is inconceivable that the AJ would have made this same finding if he had had before him the benefit of the evidence that was discovered after he wrote his initial decision. Furthermore, the initial decision clearly reflects that the AJ reached certain conclusions and made certain findings regarding petitioner's PTSD that are inconsistent with the decision and order by the Employees' Compensation Appeals Board. For example, the AJ stated:

> I also find that the undisputed evidence demonstrates that, confronted with an employee who had stopped working of his own volition and who had made no effort to return to work, the agency sought medical evidence from him in order to ascertain the parameters of his medical condition and his prospects for returning to work. (A-1Ø)

This finding and others may well have been different had the AJ had the benefit of the decision and order of the Employees' Compensation Appeals Board. In fact, had the agency not pressed for a termination of

petitioner and granted him leave or placed him in an appropriate status until the final conclusion of his worker's compensation appeal, the instant case would not have been a necessary proceeding.

The petitioner raised the issue of the new evidence in his petition for review to the Board. The Board did not address the issue. The Board erroneously found that the petition for review did not meet the criteria for review set forth in 5 C.F.R. Section 1201.115 on the grounds that the petition constituted mere disagreement with the AJ's findings and credibility determinations. The cited section of the Code of Federal Regulations at paragraph (a) provides:

> The petition for review must state objections to the initial decision that are supported by references to applicable laws or regulations and by specific references to the record.

Petitioner stated the issues reflecting objections to the initial decision, cited references to applicable case law, and made

references to evidence that supported his arguments, including his argument that the AJ's interpretation of the record was contrary to the facts of record. An examination of the petition for review filed with the U.S. Merit Systems Protection Board will substantiate this. The Board, however, summarily determined incorrectly that petitioner had failed to comply with the Code of Federal Regulations. The Board failed to address any of the issues, including the issue of the newly discovered evidence, raised by petitioner. This course of action by the Board was arbitrary, capricious, and an abuse of discretion.

The Court of Appeals likewise failed to address the issue of the new evidence which was discovered by petitioner after the close of the case before the AJ.

BASIS FOR FEDERAL JURISDICTION

Federal jurisdiction is proper in this case pursuant to 28 U.S.C. 1292(c)(1) and 28 U.S.C. 1295(a)(9). Petitioner is a Federal employee who appealed from a final decision of the Merit Board Systems Protection Board.

ARGUMENT

Certiorari should be granted to settle an important question of federal law which has not but should be settled by this court. The issues raised by this case will substantially impact upon procedures of the U.S. Merit System Protection Board, since the Code of Federal Regulations does not provide a procedure to reopen a case after the rendering of an initial decision by an administrative judge, where a party discovers new material evidence that was not available despite due diligence before the record closed. The court of appeals decision without opinion in the instant case,

furthermore, appears to be in conflict with the per curiam decision in the Ninth Circuit case of Weaver v. Department of Navy, 2 M.S.P.R. 129 (1980) review denied 669 F.2d 613.

The Merit Systems Protection Boared and the Court of Appeals for the Federal Circuit clearly and erroneously disregarded the guidelines for review set forth in 5 C.F.R. 1201.115(c), which provides:

> The Board, after providing the parties with an opportunity to respond, may grant a petition for review when it is established that:
> (1) New and material evidence is available that despite due diligence, was not available when the record closed; or
> (2) The decision of the judge is based on an erroneous interpretation of statute or regulation.

The decision of the Board was unsupported by substantial evidence and clearly failed to address the issue of the new evidence discovered by the petitioner after the close of the record before the administrative

judge. The Board disregarded its own guidelines set forth in Weaver v. Department of Navy, supra.

Weaver v. Department of Navy, id. provides: (1) that the Board is free to substitute its own determinations of fact for those of the administrative judge; (2) the petitioning party must specify and identify evidence of record which demonstrates the error of the administrative judge; (3) the petition for review must contain certain specifications or reasons warranting review of the administrative judge's findings; and (4) the petitioning party must establish that new and material evidence is available that despite due diligence was not available when the decision of the administrative judge was issued. Petitioner met each and every criteria for review, yet the Board did not address the issue of the new evidence.

In his petition to the Board, petitioner clearly identified the new evidence which he

wished the Board to consider. Petitioner satisfied the due diligence requirement when he explained that he had sought the production of exculpatory evidence in the nature of logs which may have been discovered in the initial investigation, which is the basis for all of the adverse action which has been taken by the respondent against him, and that this evidence was suppressed only to be discovered in collateral litigation after the administrative judge issued his initial decision in the instant case. Petitioner satisfied the materiality criteria and further satisfied the identification criteria when he repeatedly demonstrated relevancy and how the lack of the new evidence colored the erroneous beliefs and findings of the administrative judge, when he found that the agency had done nothing intentional to contribute to petitioner's post traumatic stress disorder and that the PTSD was self generating. The new evidence would have

altered these erroneous findings. Petitioner clearly set forth sufficient reasons warranting a review and reversal of the initial decision. The Board's failure to address the issue of the new evidence and its blatant disregard of its own guidelines was arbitrary, capricious, and an abuse of discretion, particularly when the agency violated its own rules and the rules of justice and fairness in its zeal to terminate petitioner from employment.

The agency's overall treatment of petitioner is reflected in the entire record of both Merit System Protection Board cases. An appellate court is required to reverse if there is evidence that the decision of an agency is unsupported by substantial evidence or there is an arbitrary abuse of discretion, Mackowiak v. University Nuclear Systems, Inc. 735 F2d 1159 (9th Cir. 1984). There it was recognized that the dual motive test could be applied where the employee shows that some

other reason than the stated reason for the discharge is the motivating factor for his termination. The burden then shifts to the employer to show that it would have terminated the employee, anyway. The employer bears the risk that the influence of illegal motives cannot be separated from legal motives for the termination. Petitioner argued in both Merit Board cases that he believed that he was the victim of a conspiracy and retaliation. The suppression of t[illegible] by the Agency supports these arguments. Pogue v. U.S. Department of Labor, [illegible] (9th Cir. 1991) is another dual motive case that recognizes that an agency [illegible] isolate a stated reason for termination [petitioner's inability to perform his assigned duties in the instant case] from [this misconduct of the agency (terminating petitioner herein on false evidence, suppressing exculpatory evidence, the Paramount log). The Board

should have remanded the case. This court must now consider this matter and reverse the Board and the Court of Appeals. The suppression of the new evidence by the agency raises a strong inference that gives credence to petitioner's [illegible] conspiracy and retaliation. [illegible] in either [illegible] evidence, certain findings [illegible] would undoubtedly have been [illegible] to petitioner [illegible] the administration [illegible] believe that the agency would have done anything wrong. His findings were colored by this belief and his erroneous belief that petitioner's PTSD was self-generating. Had he had knowledge of the new evidence [illegible] was impressed by the agency [illegible] the conclusions and findings that he did, particularly in the light of the final decision in petitioner's workers' compensation case, which was also decided in favor

of the petitioner after the decision of the administrative judge was rendered. In the light of the newly discovered exculpatory evidence of the suppressed Paramount log, petitioner's position is not a mere disagreement with the administrative judge's findings and credibility determinations. The administrative judge quite simply did not have all of the facts.

The Merit System Protection Board was apprised of the existence of the new evidence, the Paramount log. The new evidence met the criteria of 5 C.F.R. Section 1201.115 and should not have been disregarded by the Board. Its disregard of the new evidence and its implications and potential for impact upon the issues of this case and thus on the administrative judge was arbitrary, capricious and an abuse of discretion.

Petitioner would in all probability not have been subject to a second termination if

the evidence of the Paramount log had not been suppressed. He would have been fully vindicated in his own eyes and the eyes of his superiors, his fellow workers, and the employees of the plants to which he was assigned to inspect. To the contrary, however, he lived in the shadow of a traumatic experience where, although he had demonstrated some of the incredulity of the agency's case at the first Merit Board hearing, he had not been able to prove his theories of retaliation and conspiracy. Petitioner perceived that doubts about his credibility still remained in the perspective of his superiors, superiors who had to have confidence in him if he were to perform his job properly.

Unfortunately, petitioner developed a PTSD of which the symptoms became so manifest that his doctors determined that he could not work. The agency further exacerbated his condition by opposing his application for

workers' compensation, by violating its own rules and policy directives by requiring petitioner to make decisions and choices or face the consequences of termination, which it cannot have required him to make under its own stated Policy, by opposing him in an EEO claim in which he has now prevailed, and by opposing him regarding issues of his back pay in the first Merit Board case. Petitioner believed that the agency intended to take whatever steps were necessary to get rid of him, but the proof of the extent to which the agency would go did not surface until after the decision was rendered by the administrative judge in the instant case. All actions taken by the agency to legitimize its intended course of action to terminate petitioner must be weighed in light of the impact of the new evidence. It should also be recalled that petitioner was suffering with post traumatic stress disorder as the process was unfolding. His distrust of the

agency was justified in light of the new evidence. This distrust and a feeling of being betrayed by the agency after years of loyal service, coupled with the cumulative effect of all that the agency had done to him after he was falsely accused, only served to exacerbate his medically diagnosed PTSD. Ultimately, he was terminated because he could not return to work because of his PTSD. Throughout all of these proceedings, the agency has continued to deny any culpability, which fact in light of the new evidence, which had been suppressed, should have demonstrated to any reasonable administrative judge that such a position is untenable.

It is clear that the newly discovered evidence was of facts existing at the time of the hearing of which petitioner was excusably ignorant despite due diligence by him to learn about the existence of such evidence and the agency's knowledge of the existence of it, and that this evidence is admissable

and would probably effectively change the results of the former hearing. Having met this criteria certiorari should be granted and the case should be reversed and remanded to the fact finder. See Wright & A. Miller, Federal Practice & Procedure, Section 2808.

Petitioner raised these issues and concerns both to the Merit Systems Protection Board and the court of appeals. Neither body addressed the issue of the newly discovered evidence which had been suppressed by the agency. The failure to address the issue of the new evidence was clearly erroneous. The failure to address this issue and remand the case for further proceedings regarding the new evidence resulted in a denial of due process under the Fifth Amendment to the United States Constitution. It has been recognized that the right to hold specific private employment and follow a chosen profession free from governmental interference falls within the concepts of

"liberty" and "property" of the Fifth Amendment. Greene v. McElroy 360 U. S. 474, 3 L.Ed. 2d 1377, 79 S. Ct. 1400 (1959). This same protection should not be denied to a person who has chosen employment within the federal govenment. The basic principles of fairness require, that when such evidence which would obviously have had the impact on the finder of fact that the Paramount [illegible] would have had, is discovered after it had been suppressed by the investigatory agency, then the subsequent appellate authorities should have reversed and remanded the case for further proceedings. Lehman v. Trout, 465 U.S. 1056, 79 L.Ed.2d 732, 104 S.Ct. 1404 (1984). Their failure to do so resulted in petitioner's removal from the rolls of employment and thus a denial of his Fifth Amendment rights.

Unlike the Federal Rules of Civil Procedure for trials, the code of federal regulations does not provide a procedure for

filing a motion to reopen a case before the judge after the initial decision becomes final. In fact 5 C.F.R. 12Ø1.112 specifically limits the authority of the administrative judge after issuing the Initial Decision. Petitioner's only avenue of redress was to raise the issue to the Merit Board, which was free to substitute its own determinations of fact for those of the administrative judge. Weaver v. Department of Navy, supra. The Board, however, failed to address the issue of the newly discovered evidence.

This court must now focus upon the issues of this appeal and consider whether certiorari should be granted and the case be reversed because the U.S. Merit Systems Protection Board erred in its finding that the petition for review did not meet the criteria for review set forth at 5 C.F.R. Section 12Ø1.115. The Agency at the minimum

should have adhered to its own guidelines set forth in Weaver v. Department of Navy, supra.

This court must now tell the court of appeals and the Merit Board that when a party discovers new material evidence after the close of the record which was not available prior to the close of the record despite due diligence by that party, and the evidence is relevant, then the court of appeals and the Merit Board must address the issue of the new evidence, if raised on appeal.

CONCLUSION

For the foregoing reasons, petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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(502) 585-5100

Dated 2nd June, 1992

PROOF OF SERVICE

COMMONWEALTH OF KENTUCKY)
)
COUNTY OF JEFFERSON)

Alan W. Roles, being first duly sworn, deposes and says that he is admitted to practice before the Supreme Court of the United States; that on the 2nd day of June, 1992, the Petition for Writ of Certiorari in the above entitled case was deposited in a

United States Post Office mail box located in Louisville, Kentucky, with First Class postage prepaid properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing said Petition for Writ of Certiorari, and with an additional copy of the petition and affidavit of mailing on counsel for respondent: Solicitor General of the United States Department of Justice, Washington D.C. 20530 and to Mr. David M. Cohen and Ms. Jeri Kaylene Somers, Department of Justice, Civil Litigation Branch, Civil Division, Room 9116, 550 11th Street, N.W., Washington, D.C. 20530. Dated at Louisville, Kentucky, this 1st day of June, 1992.

ALAN W. ROLES, Affiant

Subscribed and sworn to before me a Notary Public by Alan W. Roles, Affiant herein, this 2nd day of June, 1992.

My Commission expires: January 28, 1994.

Tammara M. Waldridge
TAMMARA M. WALDRIDGE
NOTARY PUBLIC STATE AT LARGE, KENTUCKY

APPENDIX

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ST. LOUIS REGIONAL OFFICE

NORMAN A. HARRIS APPELLANT, v. DEPARTMENT OF AGRICULTURE, Agency.	DOCKET NUMBER SL07529010374 DATE: Dec. 11, 1990

Alan W. Roles, Esquire, Louisville, Kentucky, for the appellant.

Ted L. Elders, Minneapolis, Minnesota, for the agency.

BEFORE

Jack E. Salyer
Administrative Judge

INITIAL DECISION

The appellant timely appealed his removal from the position of Food Inspector, Food Safety and Inspection Service, Louisville Kentucky, effective August 10, 1990. The appellant has appeal rights to the Merit Systems Protection Board (Board) under

5 U.S.C. Sections 7511(a)(1)(A), 7512(1), 7513(d), and 7701(a).

For the reasons outlined below, I AFFIRM the appellant's removal.

ANALYSIS AND FINDINGS

Background and undisputed facts.

The appellant appealed an earlier removal, effective September 9, 1988, for falsification of time and attendance reports and absence without leave (AWOL). Administrative Judge Wilhelmina Douglas Stevenson found the agency's charges not supported by a preponderance of the evidence and reversed the removal action. See Norman A. Harris v. Department of Agriculture, MSPB Docket No. SL07528810467, slip op. (Initial Decision, Jan. 17, 1989). Judge Stevenson's decision became the final decision of the Board on February 21, 1989, and the appellant was restored to duty on or about that

date.[1]

After being restored to duty, the appellant worked for two days and then ceased coming to work based on the medical guidance of his psychiatrist, Fred Stocker, M.D. The appellant subsequently filed a claim for compensation with the Office of Workers' Compensation Programs (OWCP) of the Department of Labor, contending that because of his employment with the agency, he had developed emotional problems which rendered him unable to perform the duties of his position. While the appellant's compensation claim has been repeatedly denied by OWCP, it is still pending in the OWCP appellate process.

The appellant was carried in a leave or leave without pay (LWOP) status from February 22 to September 9, 1989. When the appellant

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[1] The appellant's petitions for attorney fees and enforcement concerning the prior appeal are currently pending before the Board.

did not return to work following the expiration of the last period of LWOP granted to him, he was placed in an AWOL status effective September 10, 1989, and remained in that status continuously until the date of his removal, August 10, 1990. During the 11-month period after he was placed on AWOL, the appellant made no attempt to return to work. See generally Appeal File.

The agency's charge that the appellant was unable to perform his assigned duties and responsibilities is supported by a preponderance of the evidence.

The agency proposed and effected the appellant's removal based on his alleged inability to perform his assigned duties and responsibilities. The agency's action was based on the appellant's voluntary absence from work for a period of approximately one and one-half years, his failure to attempt to return to work during that period, and

medical evidence which the agency had received from the appellant's treating psychiatrist and psychologists concerning his medical condition of post traumatic stress disorder (PTSD). Appeal File, Tabs 4(4k) and (4h).[2]

In Smith v. Department of the Air Force, 22 M.S.P.R. 255, 257 (1984), the Board held that when an agency asserts a cause of action based on an employee's inability to perform his duties, the agency must not rely solely upon a showing that the employee has a disabling condition. Rather, the agency must establish a nexus between the medical condition and observed deficiencies in work

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[2] The appellant contends that because the agency placed him on AWOL, it was somehow required to base its removal action on AWOL. I am aware of no law, rule, regulation, or Board or court decision supporting such a proposition. Therefore, because in taking the present action, the agency did not charge the appellant with AWOL, I need not address the propriety of the agency's action placing him in an AWOL status from September 10, 1989, to the date of his removal.

performance or conduct or a high probability of hazard that the condition may result in injury to the employee or to others because of the kind of work the employee performs. See also Steve v. Department of the Air Force, 14 M.S.P.R. 491, 493 (1983); Owens v. Department of the Air Force, 8 M.S.P.R. 580, 583-84 (1981).

Here, it is undisputed that based on his emotional condition, the appellant was unable to perform the duties and responsibilities of his position in the period between the date he left work, February 21, 1989, and the date of his removal, August 10, 1990. In addition, in support of the charge, the agency relied on the medical documentation supplied to it by the appellant himself in support of his extended absence, the appellant's candid admission that he was not medically able to perform the duties and responsibilities of his position, and his voluntary absence from work. Appeal File,

Tabs 4(4t) and (4u); see generally the appellant's hearing testimony. I specifically note that, in a letter to the agency dated August 17, 1989, the last medical documentation presented to the agency before the appellant's removal was proposed, Dr. Stocker states that:

> Given the severity of [the appellant's] present symptomatology I do not believe that he could successfully return to work for the U.S.D.A. at this time, nor can I predict adequately a length of time where me may be able to. Mr. Harris, himself, feels that he can no longer work for the U.S.D.A. and the cognition of doing so is triggering a severe exacerbation of his PTSD.

(Emphasis supplied). Appeal File, Tab 4(4t).

As noted, the appellant does not dispute, and in fact concedes, that he was medically unable to work during the February 21, 1989-August 10, 1990, timeframe. As to the charge against him, the appellant contends that: (1) the agency could not remove him from his position as long as his

OWCP claim was pending; (2) the agency violated its own regulations by requiring him to present medical documentation supporting his absence; (3) the agency should have placed him in a LWOP status for six months beginning in September 1989, which would have allowed him time to obtain treatment for his medical condition and to be able to return to productive employment; and (4) his condition was caused by intentional supervisory harassment, abuse, discrimination, and reprisal.

First, I find the appellant's claim that the agency could not remove him from his position as long as his OWCP claim was pending is without merit. The appellant did not identify, and I am not independently aware of, any law, rule, regulation, or Board or court decision supporting such a proposition.

Next, the appellant argues that the charge of inability to perform can not be

sustained because the agency violated its own regulations and policy when it required him to present medical documentation concerning his absence. For the following reasons, I find this claim to be without merit. The reference by the appellant is contained in an agency document entitled "FSIS LWOP POLICY" and is stated as follows: "An employee returning to duty is not obligated to provide a return to duty authorization signed by a physician." Appeal File, Tab 4(4z) I find that on its face, this statement of agency policy is not applicable to the facts of the instant case. The appellant made no attempt to return to duty, and the agency did not require him to submit medical authorization in support of such a return. Instead, the agency only required the appellant to submit medical documentation concerning his continuing absence, a requirement clearly not precluded by the statement of agency policy.

Moreover, I find the claim, if accurate, to be irrelevant in view of the appellant's candid admissions concerning his ability to perform. I find the medical documentation supplied by the appellant at the agency's request to be only cumulative evidence supporting the agency's charge. I also find that the undisputed evidence demonstrates that, confronted with an employee who had stopped working of his own volition and who had made no effort to return to work, the agency sought medical evidence from him in order to ascertain the parameters of his medical condition and his prospects for returning to work. Under the circumstances, I find the agency's action quite reasonable.[3]

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[3] Furthermore, although the appellant does not expressly so claim, I do not find that any requirement that he supply medical evidence could have constituted harmful procedural error under 5 U.S.C. Section 7701(c)(2)(A). The appellant has presented no evidence or argument that requiring him to

Turning to the appellant's third argument, the Board has consistently held that while the granting of LWOP is a matter within an agency's discretion, that discretion is reviewable for abuse. See Davis v. Department of the Army 29 M.S.P.R. 615, 617-18 (1986); Kamer v. Department of the Navy, 6 M.S.P.R. 184, 187-88 (1981). Here, I find that the agency has demonstrated that, given the circumstances present in the case, it did not abuse its discretion when it refused to grant the appellant the LWOP which he had requested.

The appellant had already been absent from work for a prolonged period of time when the agency denied his request for LWOP in September 1989. During this period, the appellant made no attempt to return to work

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(Footnote continued from page A10) submit medical documentation had a harmful effect on the outcome of the case before the agency. See Parker v. Defense Logistics Agency, 1 M.S.P.R. 505, 513-14 (1980).

and, based on his candid testimony and the medical evidence presented by him to the agency, supra, he was concededly not capable of performing the duties and responsibilities of his position. I note specifically the appellant's candid admission that he could not have performed the duties and responsibilities of his position on the date of his removal, August 10, 1990. Hearing Transcript (Tr.) 165.66. In addition, shortly before receiving the appellant's request for LWOP, the agency had received Dr. Stocker's August 17, 1989, medical report which was frankly pessimistic about the possibility of the appellant ever returning to work. The agency was also obviously aware that the appellant had previously filed a claim for workers compensation benefits in which he conceded that he was not able perform the duties and responsibilities of his position. I also note that, although the appellant was not removed by the agency until

well after the six-month period of requested LWOP would have elapsed had it been granted, he made no attempt to return to work at any time prior to his removal. In this vein, the appellant has not explained why, regardless of whether he was granted LWOP or was placed on long-term AWOL, he could not have obtained necessary medical and psychological treatment in the one-and-one-half-year period before he was removed.

Finally, I note that the agency's denial of the appellant's request for LWOP was consistent with its own policy guidelines concerning LWOP. Those guidelines expressly provide that LWOP is not to be granted where, as here, there is no reasonable expectation that an employee will be able to return to duty. Appeal File, Tab 4(4z).

Accordingly, I find the granting of LWOP here to be inconsistent with the overwhelming evidence of record that the appellant was unable to perform the duties and responsi-

bilities of his position and probably never would be. Based on the evidence before the agency, I find the agency's assessment that there was no reasonable expectation that the appellant would ever be able to return to work to be quite reasonable. Therefore, I find that the agency did not abuse its discretion in denying the appellant's request for LWOP. See David, 29 M.S.P.R. at 617-18.

Finally, based on all the record evidence before me, I do not find the appellant's claim that his conceded inability to perform the duties and responsibilities of his position was based on intentional agency harassment, abuse, discrimination, and reprisal to have merit.

I find that, when analyzed, the appellant's claim that his PTSD was exacerbated by various correspondence which he received from various agency officials during the lengthy period of his absence prior to his removal being proposed and effected, while conceiv-

ably accurate in view of his medical condition, demonstrates that while the documents which the appellant received were not of a harassing nature, the appellant's reactions to them were unreasonable. Although there are several such documents in the record, I believe that analysis of only one and the appellant's reaction to it supports the foregoing proposition.

On April 11, 1990, John A. Mehl, Assistant Personnel Officer, Personnel Operations Branch, sent the appellant a letter. In the letter, Mehl first traced the events which had occurred since the appellant's first removal action had been reversed on appeal and he was restored to duty and which are also described in the Background section of this decision, supra. The letter then described the employment dilemma in which the appellant's continuing absence left the agency, i.e., an encumbered position which could not be filled as long as the

appellant was still on the agency's rolls and whose duties and responsibilities had to be performed by other employees. The letter then informed the appellant of the options that were available to him: (1) to return to duty in his own position or another position if he were medically able to work; (2) to seek disability retirement; and (3) to resign. Finally, the appellant was informed that his failure to exercise one of the foregoing options could result in his removal. Appeal File, Tab 4(4n). On its face, and under the circumstances, I find this letter to be a remarkably routine and model communication from an agency to an employee about an employment problem affecting that employee. The letter simply describes the undisputed factual circumstances surrounding the appellant's extended absence and sets out several options that were available to him. I certainly do not find that a reasonable person would consider

Mehl's letter to be of a harassing nature. I do find the fact that the appellant found it to be harassing and threatening constitutes proof of the internal nature of his emotional problems, a finding which is corroborated by the medical evidence, infra. I also find that the foregoing reveals that the appellant, for whatever reasons, reacts abnormally and unreasonably to routine written communications from agency officials.

The appellant reacted in a similar vein to a letter dated August 23, 1989, from Ellen L. Barbeck, Personnel Staffing Specialist, which addresses the appellant's request for an extension of his LWOP and, like Mehl's letter, supra, sets out various options available to the appellant. Appeal File, Tab 4(4r). I find that this letter, like Mehl's, reasonably addresses the agency's continuing employment dilemma with the appellant and that it is certainly not objectively abusive or harassing.

Finally, I find that the medical evidence supplied by the appellant, Dr. Stocker's medical reports dated July 21 and August 17, 1989, Appeal File, Tabs 4(4u) and (4t), do not even suggest that the agency should be blamed for the appellant's diagnosed condition of PTSD. Rather, they consistently reference the appellant's own state of mind, i.e., his internal beliefs, manifesting themselves in a variety of physical and mental symptoms, that he is being persecuted by the agency.[4] While the foregoing is apparently the appellant's heartfelt and genuine belief, based on my review of all the evidence of record, I do not find it to be grounded in reality. Based on the evidence presented to me, I do not

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[4] The appellant's hearing testimony is couched in a similar vein. He describes a widespread conspiracy, involving numerous agency officials, designated to drive him from the agency. See generally the appellant's testimony. Tr. 142-219.

find that the agency intentionally took actions against the appellant which caused his medical condition of PTSD -- rather, I find that the appellant's PTSD was caused by his personal belief, unfounded on the facts before me, that he was being persecuted by the agency.

In sum, the evidence of record simply does not support the appellant's bare claims, and wholly uncorroborated testimony, of mistreatment by agency officials. Accordingly, based on my review of the evidence of record, I do not find that the appellant's medical condition was caued by intentional agency harassment, abuse, discrimination, and reprisal.

Therefore, based on my review of all the evidence of record, I find that the agency has demonstrated a nexus between the appellant's medical condition and observed deficiencies in his work performance or conduct, i.e., his voluntary absence for a

period of approximately one and one-half years. See Steve, 14 M.S.P.R. at 493; Owens, 8 M.S.P.R. at 583-84. Accordingly, I find that the agency's charge is supported by a preponderance of the evidence, and it is sustained. 5 U.S.C. Section 7701(c)(1)(B).

The appellant has not demonstrated by a preponderance of the evidence that he was discriminated against on the basis of his race.

The appellant (black) claims that his removal was based on his race. Specifically, the appellant claims that had he been a similarly situated non-black employee, he would not have been removed.

An appellant who raises the affirmative defense of race discrimination bears the burden of proving such claim by a preponderance of the evidence. See 5 U.S.C. Section 7701(c)(2)(B); 5 C.F.R. Section 1201.56(a)(2)(iii); McDonnell Douglas Corp.

v. Green, 411 U.S. 792, 802-04, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). With respect to the order and allocation of proof concerning discrimination issues, the Board has held that when the agency has established a legitimate, nondiscriminatory reason for its action, questions of discrimination must be resolved by proceeding directly to the issue of whether the appellant has established pretext. See Greenberg v. Federal Deposit Insurance Corporation, MSPB Docket No. NY03518710323, slip op. at 5-6 (Aug. 23, 1988); Narcisse v. Department of Transportation, 32 M.S.P.R. 232, 234 (1987). In this case, I have found that the agency has demonstrated a legitimate, nondiscriminatory reason for its action removing the appellant, i.e., the sustained charge, and will find, infra, that the penalty which was accorded the appellant was appropriate under all the facts and circumstances in the case.

I further find that the appellant has failed to establish that the agency's removal action involved pretext for race discrimination. The appellant has not identified any similarly situated non-black employees who were treated in a disparate fashion from him. I also find that his uncorroborated and speculative testimony that the agency would not have removed similarly situated non-black employees, had there been any, certainly does not establish pretext. Finally, I find that the appellant has presented no other evidence which would establish pretext for discrimination against him based on his race.

Therefore, I find that the appellant has failed to establish that the agency's action removing him was a pretext for race discrimination. Accordingly, I find that the appellant has failed to prove his claim of race discrimination by a preponderance of the evidence. See 5 U.S.C. Section 7701(c)(2)(B); 5 C.F.R. Section 1201.56(a)(2)(iii);

Greenberg, MSPB Docket No. NY03518710323, slip op. at 5-6; Narcisse, 32 M.S.P.R. at 234.

The appellant has not demonstrated by a preponderance of the evidence that he was discriminated against on the basis of a handicapping condition.

An appellant must prove an affirmative defense of handicap discrimination by a preponderance of the evidence. See 5 U.S.C. Section 7701(c)(2)(B); 5 C.F.R. Section 1201.56(a)(2)(iii); Kelley v. Department of Health and Human Services, MSPB Docket No. DA07528919478, slip op. at 4 (Nov. 7, 1990); Clancy v. Department of the Navy, 6 M.S.P.R. 196, 199 (1981). The appellant must prove not only that he suffers from a handicapping condition, but that the condition caused the conduct which resulted in removal. See Conti v. Department of the Army, 34 M.S.P.R. 272,

1277 (1987); Myers v. Department of the Air Force, 28 M.S.P.R. 479, 480-81 (1985).

The appellant may establish a prima facie case of handicap discrimination by: (1) showing that he is a handicapped person under 29 C.F.R. Section 1613.702(a), and that the action appealed was based on the handicap; and (2) to the extent possible, articulating a reasonable accomodation under which he believes that he could perform the essential duties of his position or of a vacant position to which he could be reassigned. See Savage v. Department of the Navy, 36 M.S.P.R. 148, 151-52 (1988). A "handicapped person" is defined, in part, at 29 C.F.R. Section 1613.702(a), as one who has a physical or mental impairment which substantially limits one or more of such person's major life activities.[5] The regula-

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[5] "Major life activities" include such functions as caring for one's self, performing manual tasks, walking, seeing,

tions further defind mental impairment as "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities." 29 C.F.R. Section 1613.702(b)(2).

Here, I find that it is undisputed that the appellant suffers from a mental disorder, PTSD, which affects a major life function, his work. Because of this condition, the appellant is unable to perform the duties and responsibilities of his position. Therefore, I find that the appellant has established that he is a handicapped person under 29 C.F.R. Section 1613.702(a) and that his conduct, his lengthy absence from work, was caused by his condition. See Kelly, MSPB Docket No. DA07528919478, slip op at 4.

(Footnote continued from page A24) hearing, speaking, breathing, learning, and working. 29 C.F.R. Section 1613.702(c).

However, I further find that the appellant has failed to articulate a reasonable accomodation under which he believes that he could perform the essential duties of his position or of a vacant position to which he could be reassigned. See Savage, 36 M.S.P.R. at 151-52. The only accomodation mentioned by the appellant anywhere in the appellate record is that discussed, supra, that he be given six months LWOP in order to obtain medical rehabilitation. For the reasons set out in detail, supra, and which I will not repeat here at length, I do not find the suggested accomodation to have been a reasonable one. Simply put, the suggested accomodation is supported by neither the medical documentaion supplied by the appellant, supra, nor the actual events which transpired -- although the agency waited several months past the requested six-month period before taking any action against the appellant, he made no effort to return to

work and presented no medical evidence of recovery at any time. I also note again the appellant's concession at the hearing that at the time of his removal, he could not have performed the duties and responsibilities of his position. Tr. 165-66. Under the circumstances, I find that the accomodation suggested by the appellant was not a reasonable one.

Accordingly, I find that the appellant has not articulated a reasonable accomodation under which he could perform the essential duties of his position or of a vacant position to which he could be reassigned. Therefore, I find that the appellant has not established that he is a qualified handicapped employee under 29 C.F.R. Sections 1613.702(f) and .704(a). See Savage, 36 M.S.P.R. at 151-52.

Finally, I find that even assuming arguendo that the appellant had established that he was a qualified handicapped employee,

the agency met its burden of accommodation. After the appellant stopped coming to work in February 1989, the agency waited nearly one and one-half years before removing him. During this extended period, the appellant sought and obtained, from Dr. Stocker and others, medical and psychological assistance.

The Board has consistently held that an agency's referral of a mentally handicapped employee for treatment satisfies its burden of accommodation. See Anderson v. Department of the Navy, 42 M.S.P.R. 16, 19-20 (1989); De Donato v. United States Postal Service, 25 M.S.P.R. 286, 293 (1984), vacated and remanded on other grounds, 785 F.2d 320 (Fed. Cir. 1985) (Table).

Here, agency referral of the appellant for treatment of his condition would have been superfluous as he had already sought and obtained medical and psychological assistance. Therefore, I find that the agency accommodated any handicapping condition

affecting the appellant by waiting a lengthy amount of time, approximately one and one-half years, before taking any adverse action against him.[6]

Accordingtly, I find that the appellant has not demonstrated by a preponderance of the evidence that the agency discriminated against him on the basis of a handicapping condition when it removed him. See 5 U.S.C. Section 7701(c)(2)(B); 5 C.F.R. Section 1201.56(a)(2)(iii); Kelly, MSPB Docket No. DA07528919478, slip op. at 4.

The appellant has not demonstrated that he was removed in reprisal for his whistleblow-

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[6] Although the appellant does not contend that he should have been reassigned to another position as a means of accommodating his handicapping condition, I note that in Mehl's letter to the appellant dated April 11, 1990, one mentioned option was possible reassignment to another position. Appeal File, Tab 4(4n). The appellant never responded to Mehl concerning a possible reassignment to another position.

ing activities or for filing discrimination complaints.

The appellant contends that he was also removed in reprisal for protected disclosures, concerning allegedly spoiled meat which agency officials had allowed a meat packing plant to process, which he made to Congressmen and others prior to the 1988 removal action. The appellant also contends that he was removed in reprisal for filing discrimination complaints.

Under 5 U.S.C. Section 2302(b)(8)(A), a protected disclosure is one which an appellant reasonably believes evidences: (1) a violation of any law, rule, or regulation, or (2) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. In order to prevail on the merits of his appeal, the appellant must demonstrate that a disclosure described under

5 U.S.C. Section 2302(b)(8) was a contributing factor in the personnel action. See Gergick v. General Services Administration, 43 M.S.P.R. 651, 659 (1990). The Board has also held that a complaint of discrimination involves a disclosure protected under 5 U.S.C. Section 2302(b)(8). See Williams v. Department of Defense, 45 M.S.P.R. 146, 149 (1990).

Here, it is undisputed that the appellant made the described disclosures to Congressmen and others and also filed discrimination complaints. Therefore, I find that the appellant made disclosures protected under 5 U.S.C. Section 2303(b)(8).

For the following reasons, I do not find that the appellant has demonstrated that his protected disclosures were contributing factors in the removal action. The appellant's removal was effective on August 10, 1990, almost two years after his whistleblowing concerning alleged illegal approval

of spoiled meat took place and at least three years after his last discrimination complaint was filed. Therefore, I find that the removal action under appeal was not taken in close proximity to the appellant's protected disclosures. In addition, the present charge, inability to perform, is one which is wholly unrelated to the substance of the appelant's whistleblowing and discrimination complaints. Finally, beyond this uncorroborated opinion testimony, to which I give little weight, the appellant presented no evidence that reprisal for whistleblowing and filing discrimination complaints were contributing factors in the removal action.

Accordingly, I find that the appellant has failed to demonstrate that his protected disclosures were contributing factors in the removal action. See Gergick, 43 M.S.P.R. at 659; Williams, 45 M.S.P.R. at 149.

Moreover, assuming arguendo that the appellant had been able to demonstrate that

reprisal for his protected disclosures was a contributing factor in his removal, I further find that the agency has presented clear and convincing evidence that, in the absence of the appellant's protected disclosures, it would nevertheless have removed him. That finding is based on the nature and seriousness of the sustained charge, supra, and the propriety of the penalty of removal, infra. See Gergick, 43 M.S.P.R. at 662-63.

The appellant's removal promotes the efficiency of the service and is an appropriate penalty under all the facts and circumstances.

I have already found a nexus between the appellant's medical condition and his inability to perform the duties and responsibilities of his position. In addition, inability to perform, as reflected in an employee's lengthy absence from work with no end in sight, even if based on valid medical

reasons, is inherently disruptive to service efficiency. See Davis v. Veterans Administration, 27 M.S.P.R. 684 (1985) (Table), aff'd, 792 F.2d 1111, 1112-13 (Fed. Cir. 1986; McKenzie v. United States Postal Service, 1 M.S.P.R. 496, 498 (1980). Therefore, I find that taking adverse action against the appellant was for the efficiency of the service under 5 U.S.C. Section 7513(a). See Schoening v. Department of Transportation, 34 M.S.P.R. 556, 561 (1987); Rosiak v. Department of the Army, 31 M.S.P.R. 140, 147 (1986), aff'd 845 F.2d 1014 (3rd Cir. 1988) (Table).

The remaining issue for analysis is the appropriateness of the penalty of removal. In Douglas v. Veterans Administration, 5 M.S.P.R. 280, 306 (1981), the Board held that it would review an imposed penalty to insure that the agency conscientiously considered the relevant factors in choosing the penalty and struck a responsible balance within

tolerable limits of reasonableness. The Board will not disturb an agency's action and will accord deference to it if it is the maximum reasonable penalty which may be imposed after conmsideration of all the relevant factors. See Capito v. Veterans Administration, 39 M.S.P.R. 289 (1988), aff'd 899 F.2d 1089 (Fed. Cir. 1989) (Table); Davis v. Department of the Treasury, 8 M.S.P.R. 317, 320-21 (1981).

Here, I find that, in the appellant, the agency was confronted with an employee who concededly could not perform the duties and responsibilities of his position and, of his own volition, had not attempted to do so for nearly one and one-half years. The agency was also presented with medical documentation from the appellant's psychiatrist which was frankly pessimistic about the appellant ever

being able to return to work.[7] The agency also left the appellant on its rolls for one and one-half years before removing him, a period in which the appellant received medical and psychological assistance which ultimately proved unsuccessful in improving his condition. Based on the foregoing, I find that the agency properly concluded that there was no reasonable expectation that the appellant would ever be able to return to work.

I also find that the appellant's continuing absence was also inherently disruptive to the agency's operations as his position could not be formally filled as long as he was on the rolls and other employees were required to perform his duties and responsibilities.

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[7] During the appellate process, the appellant neither testified nor presented medical evidence that, even now, he could perform the duties and responsibilities of his position.

Under the foregoing circumstances, I find that the agency has demonstrated that the penalty which was accorded the appellant was not inappropriate under all the facts and circumstances involved. See Delessio v. United States Postal Service, 33 M.S.P.R. 517, 521, aff'd, 837 F.2d 1096 (Fed. Cir. 1987) (Table); see Woodhouse v. United States Postal Service, 29 M.S.P.R. 98, 100 (1985).[8]

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: /s/ Jack E. Salyer
Jack E. Salyer
Administrative Judge

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[8] To the extent that the appellant is claiming that the agency is improperly controverting his claim for workers compensation benefits before OWCP, the Board has held that it has no authority to review such claims. See Jackson v. Office of Personnel Management, 27 M.S.P.R. 2, 3 (1985).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

NORMAN A. HARRIS APPELLANT, v. DEPARTMENT OF AGRICULTURE, Agency.	DOCKET NUMBER SL07529010374 DATE: June 3, 1991

Alan W. Roles, Esquire, Frederick Daniels Associates, Louisville, Kentucky, for the appellant.

Lawrence S. Cavallaro, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has timely petitioned for review of the December 11, 1990 initial decision in which the administrative judge sustained his removal from the position of

Food Inspector, effective August 10, 1990. The agency has filed a timely response to the petition for review. We find that the petition does not meet the criteria for review set forth at 5 C.F.R. Section 1201.115, and we therefore DENY it. We REOPEN this appeal on our own motion under 5 C.F.R Section 1201.117, however, to address the matter of our reversal, subsequent to the issuance of the initial decision, of Williams v. Department of Defense, 45 M.S.P.R. 146 (1990) (Williams I), upon which the administrative judge relied. See Williams v. Department of Defense, MSPB Docket No. NY07529OS0119 (Jan 7, 1991) (Williams II). We AFFIRM the initial decision as MODIFIED by this Opinion and Order, still SUSTAINING the removal action.

BACKGROUND

The agency effected the appellant's removal upon the charge of inability to

perform his assigned duties and responsibilities. See Appeal File (AF), Vol. 1, Tab 4, Subtab 4K. The appellant filed a timely petition for appeal with the Board, contesting the merits of the charge and raising the affirmative defenses of racial and handicap discrimination, harmful error, whistleblowing retaliation, and reprisal for filing discrimination complaints. Following a hearing, the administrative judge issued an initial decision in which he sustained the agency's charge, found the appellant's affirmative defenses unsupported, and sustained the removal.

In his petition for review, the appellant avers that the administrative judge erred in sustaining the charge and in finding his affirmative defenses unsubstantiated. The agency maintains, in its respone, that the initial decision is correct in all respects and that the petition should therefore be denied.

ANALYSIS

Having carefully reviewed the appellant's petition for review, we find that it constitutes mere disagreement with the administrative judge's findings and credibility determinations and, as such, does not warrant full review of the record by the Board. See Weaver v. Department of the Navy, 2 M.S.P.R. 129, 133-34 (1980), review denied, 669 F.2d 613 (9th Cir. 1982) (per curiam).

With respect to the appellant's affirmative defense of reprisal for the filing of discrimination complaints, the administrative judge noted that the Board had held, in Williams I, 45 M.S.P.R. at 149, that a claim of reprisal for filing a discrimination complaint involved a disclosure protected under 5 U.S.C. Section 2302(b)(8). He therefore adjudicated this claim under the provisions of the Whistleblower Protection Act of 1989 (WPA),

103 Stat. 16. In Williams II, slip op. at 9-10, however, we reversed that determination and held that the filing of a discrimination complaint did not constitute whistleblowing under section 2302(b)(8). Such a claim remains cognizable under section 2302(b)(9). See In the Matter of Frazier, 1 M.S.P.R. 163 (1979J).

For the reasons stated below, we find that the administrative judge's reliance upon the subsequently-reversed Williams I had no effect upon the appellant's substantive rights. See Panter v. Department of the Air Force, 22 M.S.P.R. 281 (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision).

In order to prevail on a claim of whistleblower retaliation, an employee must demonstrate that a disclosure described under 5 U.S.C. Section 2302(b)(8) was a contributing factor in the personnel action.

See Gergick v. General Services Administration, 43 M.S.P.R. 651, 659 (1990). The "contributing factor" standard is a lower standard than the "substantial factor" standard that was in effect in reprisal cases prior to the enactment of the WPA. Id. Pursuant to our decision in Williams II, the stricter "substantial factor" standard is applicable to the appelant's claim of reprisal for filing discrimination complaints. See Warren v. Department of the Army 804 F.2d 654, 656-58 (Fed. Cir. 1986). Thus, the administrative judge's finding that the appellant failed to meet the more lenient "contributing factor" standard of the WPA encompasses a finding that he failed to meet the applicable, and stricter, "substantial factor" standard of Warren. Initial Decision at 14-15.*

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* Additionally, in further reliance upon Williams I, the administrative judge found that, assuming arguendo that the appellant

(Footnote continued from page A43) had been able to demonstrate that reprisal for protected disclosures was a contributing factor in his removal, the agency presented"clear and convincing" evidence that, in the absence of the appellant's protected dis- closures, it would nevertheless have removed him. Initial Decision at 15. See Gergick, 43 M.S.P.R. at 662-63. Again, this finding under the stricter WPA standard encompasses a finding that the appellant failed to meet the more lenient "preponder- ance of the evidence" standard, which is applicable to this claim pursuant to Williams II. See Rockwell v. Department of Commerce, 39 M.S.P.R. 217, 222 (1988).

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. See 5 C.F.R. Section 1201.113(c)

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commnission (EEOC) to review the Board's final decision on your discrimination claims. See 5 U.S.C. Section 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Review and Appeals
P.O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative,

if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. Section 7702(b)(1).

Discrimination and other claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. See 5 U.S.C. Section 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. Section 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer

and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. Section 2000e5(f); 29 U.S.C. Section 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. See 5 U.S.C. Section 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personal-

ly, whichever receipt occurs first. See 5 U.S.C. Section 7703(b)(1).

FOR THE BOARD:

/s/
Robert E. Taylor
Clerk of the Board

Washsington, D.C.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

91-3465

NORMAN A. HARRIS,

Petitioner

v.

DEPARTMENT OF AGRICULTURE

Respondent.

JUDGMENT

ON APPEAL from the Merit Systems Protection Board

in CASE NO(S). SL07529010374

This CAUSE having been considered, it is

ORDERED and ADJUDGED:

PER CURIAM (ARCHER, CIRCUIT JUDGE SMITH, Senior Circuit Judge, and RADER, Circuit Judge.

AFFIRMED. Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED:
MAR -5, 1992

/S/
Francis X. Gindhart, Clerk

ISSUED AS A MANDATE: April 3, 1992

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

91-3465

NORMAN A. HARRIS,

Petitioner

v.

DEPARTMENT OF AGRICULTURE,

Respondent

O R D E R

O R D E R

Before ARCHER, Circuit Judge, SMITH, Senior Circuit Judge, and RADER, Circuit Judge.

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The mandate will issue on April 3, 1992.

FOR THE COURT,

Dated: March 27, 1992 /s/
Francis X. Gindhart
Clerk

cc: ALAN W. ROLES
JERI KAYLENE SOMERS

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